No. 14802.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. SCHLESSING, claimant of 75 articles of device, more or less, designated as "The Schlessing Ultrasoniseur," together with their labeling,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

The Rulings of the Superior Court Appellate Department of Los Angeles County Relied Upon by Appellee Are Not Depositive of This Appeal nor Binding Upon This Court.

Appellee asserts that the questions on this appeal are governed by the cases of *People v. Fowler*, 32 Cal. App. 2d (Supp.) 737, 84 P. 2d 326 (1938); *People v. Mangiagli*, 97 Cal. App. 2d (Supp.) 935, 218 P. 2d 1025. Both of these decisions arise from the criminal prosecution of misdemeanors in the Municipal Court of Los Angeles and decided by the Appellate Department of the Superior Court. These cases neither represent a goodly number of trial courts of the state generally and for a

considerable period of time which have adhered to a common interpretation of this point nor have they been recognized by the Appellate Courts for the propositions upon which they are relied by Appellee. The California Appellate Courts since the passage of the Chiropractic Act in 1922 have laid down the rule that the determination of the scope of chiropractic under the Chiropractic Act must be determined by resorting to extrinsic evidence as to what was taught in schools and colleges. (*Evans v. McGranaghan*, 4 Cal. App. 2d 202, 41 P. 2d 937 (1935); *In re Hartman,* 10 Cal. App. 2d 213, 51 P. 2d 1104 (1935).) The case of *People v. Nunn,* 55 Cal. App. 2d 188, 194, 150 P. 2d 476, merely cites the *Fowler* case to the effect that a chiropractor cannot legally practice surgery and that his practice is limited to the arts taught *in the school of chiropractor.* The *Fowler* case was a municipal court prosecution of the medical practice act, the defense was that the defendant was licensed under the Chiropractic Act of 1922 and it was therefore necessary for the defendant to prove that his actions were within the scope of his license. The offense committed by the defendant appears to be an act involving surgery, although this is not set forth in the opinion, the court states however at page 749:

> ". . . and noting that the advocates of the chiropractic act stated in the arguments to voters above mentioned no objection to the scope of the license which a chiropractor could obtain under the Medical Practice Act, but on the contrary declared that under the proposed act chiropractors could not use drugs or surgery, we conclude that the words 'medicine', and 'surgery', as used in Section 7 of the Chiropractic Act, were intended to continue as to chiropractors the limitations imposed on drugless

practitioners by the Medical Practice Act, that is, to deny them the use of drugs and medical preparations and the severing or penetration of the tissues of human beings."

This being the fact the defendant was not able to substantiate by extrinsic evidence that surgery was within the scope of the chiropractic license. The same situation existed in *People v. Mangiagli,* 97 Cal. App. 2d (Supp.) 935, 218 P. 2d 1025, wherein the defendant was unable to show by extrinsic evidence that the packing of a patient's uterus with gauze, inserting a needle in a vein of her arm and injecting blood plasma, giving of parathyroid tablets and a hypodermic injection of liver extract were acts within the scope of the chiropractic license. It was therefore not necessary for the court to determine by extrinsic evidence what was taught in schools and colleges in order to determine the scope of the chiropractic act. The defendants actions in both cases were purely the practice of medicine. This fact was obvious and no amount of evidence could alter it.

Neither of these cases, relied upon so heavily by the appellee were cited or referred to in the case of *Oosterveen v. Board of Medical Examiners,* 112 Cal. 2d 201, 246 P. 2d 136, nor was the *Fowler* case cited in the case of *Hunt v. Board of Chiropractic Examiners,* 87 Cal. App. 2d 98, 196 P. 2d 77. Appellee contends that this court should be bound by the rulings contained in the *Fowler* and *Mangiagli* cases by virtue of a quoted portion from the case of State of California, *Department of Employment v. Fred S. Reynauld & Co., Inc.,* 179 F. 2d 605 (C. A. 9, 1950). The following is quoted from page 18 of Appellee's brief; "(c) a goodly number of the trial

courts of the state generally and for a considerable period of time have adhered to a common interpretation of the point." The interpretation of the scope of chiropractic contained in the *Fowler* and *Mangiagli* cases cannot be considered as a goodly number of trial court decisions of the state generally they being two in number and from the same court. The state courts have not for a considerable period of time adhered to these interpretations which, in fact, are contrary to the interpretation of the District Court of Appeal of the State of California in the case of *Hunt v. Board of Chiropractic Examiners* and the California Supreme Court in the case of *Oosterveen v. Board of Medical Examiners, supra.* Not only have the courts not adhered to such a common point of interpretation but the California legislature has indicated that the scope of chiropractic under the act encompasses more than the mere adjustment of the spine by hand. Examples of the legislative attitude can be found in the Business and Professions Code, Section 6522, relating to Barbers. This section provides as follows:

> *"Sec. 6522. Practices and persons excluded from Act.* The provisions of this chapter do not apply to:
>
> "(a) Persons authorized by the law of this State to practice medicine and surgery or osteopathy or chiropractic or persons holding a drugless practitioner certificate under the laws of this State."

Section 7324 of the Business and Professions Code relating to Cosmetology provides as follows:

> *"Sec. 7324.* Persons and practices Exempted. The following persons are exempt from this chapter:
>
> "(a) All persons authorized by the laws of this State to practice medicine, surgery, dentistry, pharmacy (including those employed in pharmacies), osteopathy, chiropractic, naturopathy or chiropody."

Section 4052 of the Business and Professions Code relates to the sale of packaged, bottled or non bulk trade marked chemicals, drugs or medicines, the sale of certain listed drugs and the sale of certain medical supplies etc., under certain conditions. This section states as follows:

> *"Sec. 4052. Application of chapter and section: Sale of packaged, bottled or nonbulk trade-marked chemicals, drugs, or medicines: Sale of certain listed drugs: Sale of certain medical supplies, etc., under certain conditions: Application of Sec. 4030.*
>
> ". . . . . .
>
> "(b) [*Sale of certain medical supplies, etc., under certain conditions not exempt from chapter.*] This chapter does not apply to the sale of any intravenous solution of 150 cubic centimeters or over; cold sterilizing solutions, sterilized sutures; hypodermic needles and syringes; sterile distilled water U. S. P.; sterile normal saline solution; laboratory chemicals and reagents, stains and dyes; chemicals and drugs used as indicators in diagnostic and X-ray examinations, soaps, detergents and tincture of green soap U. S. P.; medicinal gases, ether, chloroform and ethyl chloride; sulfa creams, ointments, and jellies used for introduction into the vaginal tract; and medicated dressings; where such sale is made to any of the following:
>
> "1. A physician, dentist, chiropodist, veterinarian, pharmacist, medical technician or medical technologist holding a currently valid and unrevoked license to practice his profession; and a chiropractor acting within the scope of his license."

These quoted sections from the California Business and Professions Code strongly indicate that the California legislature regards chiropractic as a profession and that chiropractors licensed in this state are not limited under such license to mere adjustment of the spine by hand.

Physiotheraphy Is Included in the Scope of Chiropractic Under the California Act.

Appellee asserts in its brief commencing on page 29 that physiotherapy is not a part of chiropractic. Appellee states that the case of *Oosterveen v. Board of Medical Examiners* is not helpful to Appellant's position because of a statement in the decision to the effect that it did not adopt the trial courts definition of naturopathy in all respects. The *Oosterveen* case cannot be disposed of so easily nor can the effect of the courts decision in that case be summarily dismissed when the question is presented as to the scope of the chiropractic license under the California Chiropractic Act. There can be no argument with the holding in that case that the methods of naturopaths may be employed by licensed chiropractors. Such a holding by the Supreme Court of the State of California is at variance with the restrictive definition of chiropractic adopted by the District Court in this case. The *Oosterveen* case has been recognized by the Senate Interim Committee on Licensing Business and Professions as a valid reason for refusing to again license Naturopaths in this state because a chiropractor can properly perform almost every function contained in the general definition of naturopathy. The interpretation placed upon the scope of chiropractic by the District Court and the Appellee to the effect that the term chiropractic is limited to adjustment of the spine by hand would not only leave the practice of Chiropractic in a static position contrary to the decision of the court in *Hunt v. Board of Chiropractic Examiners* (*supra*), but would obviously be a strained interpretation. Appellee in his brief at page 31 makes the following statement.

"Adjustment by hand for the treatment of disease is one form of physical therapy, but the licensed chiropractor need not comply with the new physical therapy statutes in order to continue giving manual adjustments."

Such an interpretation is unreasonable. The effect of such thinking is tantamount to saying that physiotherapists may practice chiropractic as one form of physiotherapy but a chiropractor may not practice physiotherapy, it being a special field. The scope of physical therapy is defined in Sections 2601 and 2660 of the California Business and Professions Code as follows:

"2601. 'Physical therapy' means the treatment of any bodily or mental condition of any person by the use of the physical, chemical, and other properties of heat, light, water or electricity, and by massage and active or passive exercise. The use of roentgen rays and radium, for diagnostic and therapeutic purposes, and the use of electricity for surgical purposes, including cauterization are not authorized under the term 'physical therapy' as used herein.

"2660. The term 'physical therapy' shall mean the treatment of any bodily or mental condition of any person by the use of the physical, chemical and other properties of heat, light, water, electricity, massage, and active passive, and resistive exercise. The use of roentgen rays and radium, for diagnostic and therapeutic purposes, and the use of electricity for surgical purposes, including cauterization, are not authorized under the term 'physical therapy' as used herein, and a license issued hereunder shall not authorize the diagnosis of disease.

"2665. One year from the effective date of this act, no person not licensed under this chapter shall practice physical therapy in this State for compensa-

tion received or expected; provided, however, that this prohibition shall not apply to any of the following:

"(a) Any activities authorized by their licenses on the part of any persons licensed under this code *or any initiative act.* * * *."

Appellants Opening Brief sets forth on page 40 that the only initiative measures relating to the practice of the healing arts in this state are the measures dealing with osteopathy and chiropractic and since the Chiropractic Act alone sets up an independent type of practice it is undoubtedly the Act to which the legislature made reference in the Physical Therapy Act. The prohibition against practicing physiotherapy by the wording of the act does not therefore apply to licensed chiropractors. The statute recognizes the continued use by chiropractors of physical therapy methods in the same manner as chiropractors in this state have used such methods since long before the passage of the Chiropractic Act of 1922.

The California Chiropractic Act Recognized an Existing Profession and Provided Authority to Practice Such Profession in the Same Manner as Such Profession Had Been Taught and Practiced.

Section 7 of the Chiropractic Act of 1922 authorized licensees to engage in the chiropractic profession not merely to make spinal adjustments. If only spinal adjustments had been intended then the act would have said so. Appellee refers on pages 23 and 24 of its brief to the Iowa Statute which was the subject of interpretation in the case of *State v. Boston,* 278 N. W. 291, 284 N. W. 143. The Iowa Statute defines chiropractic as: "Persons who treat human ailments by the adjustments by hand of the articu-

lations of the spine or by other incidental adjustments." If the California statute was as specific in its scope as the Iowa Statute above quoted then there would be no reason for any further interpretation by this court. Such specific prohibitions regarding the practice of Chiropractic in the state of California were not placed in the California Act. Appellee asserts that the scope of chiropractic under the act is restricted to the one subject of "chiropractic" taught in such schools and colleges and further restricted to the same manner as this particular one subject was taught in 1922. Appellee is reading into Section 7 of the Chiropractic Act something that is not there and never was intended to be placed there. Section 7 specifically defines the scope of chiropractic as: ". . . taught in Chiropractic schools and colleges." It does not define chiropractic to only the subject of chiropractic as taught in schools and colleges. If such had been intended it is submitted that the Act would have been so worded to accomplish this. This is further borne out by the decisions of *Evans v. McGranaghan,* 4 Cal. App. 2d 202, 41 P. 2d 937, and *In re Hartman,* 10 Cal. App. 2d 213, 51 P. 2d 1104. The court in these cases decided that the scope of chiropractic as taught in schools and colleges could not be decided in the absence of evidence on that subject and that a resort to such evidence would be proper. We should accept the fact that the court in these cases undertood that the particular subject of chiropractic theory and practice was certainly taught in chiropractic schools and colleges. When the court indicated that it could not decide the scope of chiropractic in the absence of extrinsic evidence as to what was taught in schools and colleges it was referring to what else was taught in such schools and colleges. The court wanted evidence of the

curriculum in order to determine the scope of chiropractic under the act. The specific subject of chiropractic theory and practice, as set forth in Appellants Opening Brief, amounted to a small part of the curriculum.

Appellee contends that the definition of chiropractic was well known in 1922 and that the California Act was intended to comply with such definitions regardless of how it is worded. Appellee has overlooked the fact that the California Chiropractic Act was really intended to cover the practice of Chiropractic in this state as it was being taught and practiced. If this were not true then there would be no reason whatsoever for the provision of the Act which appears in Section 16 as follows: "Nor shall this Act be construed so as to discriminate against any particular school of chiropractic, or any other treatment . . ." Recognition of the varied practice and teaching of chiropractic was made in providing in Section 7 of the Chiropractic Act that but one form of certificate would be issued by the Board of Chiropractic Examiners which was designated "license to practice chiropractic." This language was used to show that there would be but one certificate for all schools of chiropractic as distinguished from separate certificates for each of the methods taught by various schools or colleges. Further evidence that the act was intended exactly the way it is worded is found in the provisions of Section 6(c) of the Act which provides in effect, for written examinations in all of the subjects set forth in Section 5 to ascertain *fitness of an applicant to practice chiropractic.* (Emphasis added.) The intent of the Act was to include within the scope of the Chiropractic practice all of the matters set forth in Section 5 relating to the minimum educational

requirements. It is unreasonable to presume that the same Act that provided that chiropractic licentiates should have authority to give emergency treatment, sign death certificates and be required to comply with all regulations pertaining to public health, should be restricted to the adjustment of the vertebrae by hand. Chiropractors in this state, with the possible exception of the strict Palmer practitioners, have always engaged in physiotherapy treatments. In fact they have been the leading pioneers in this field. Appellee by its assertions has further failed to recognize that prior to the passage of the Chiropractic Act the chiropractors of California were licensed under the Drugless Practitioners Act; that those licensed under this Act used physical therapy methods extensively. The minimum educational requirements under the Drugless Practitioners Act is set forth in Appellant's Opening Brief on pages 22 and 23. The Act provides for 500 hours of manipulative and mechanical therapy. It contained no specific required subject for "chiropractic theory and practice" which appellee relies upon to limit the scope of the chiropractic license.

Unsuccessful Attempts to Amend the Chiropractic Act Does Not Change the Meaning of the Chiropractic Act.

Appellee directs attention to an attempt to amend the Chiropractic Act in the years 1934 and 1939. It is contended that in some way the failure to adopt such legislation is a factor to be considered by the court. It is natural that an attempt be made to amend the Chiropractic Act as the result of court decisions which have been discussed in this appeal. It is not surprising that certain chiropractors participated in the argument against the

enlargement of the chiropractor's authority. Appellant's opening brief dealt at some length on the difference in chiropractic philosophy which had developed between the advocates of the Palmer theory and technique and the broader theory and technique advocated by the group that became licensed under the Drugless Practitioners Act. In 1948 the Chiropractic Act of 1922 was amended. This amendment authorized the State Board of Chiropractic Examiners to approve or disapprove schools, prescribe requirements therefor, determine minimum requirements for chiropractic teachers and among other things to increase educational requirement from 2400 hours to 4,000 hours. This advancement for the chiropractic profession was bitterly resisted by certain chiropractors. The following is an excerpt from the argument made against the proposition by chiropractors:

> "This act proposes to change Chiropractic subjects to those of medicine—to wit: Analysis, the basis of Chiropractic has been completely eliminated. The study of anatony has been reduced from 25 per cent to a possible 18 per cent of the course and the Principles and Practice of Chiropractic may be completely eliminated for office procedure and some physiotherapy. Any part of 17 per cent of four thousand hours or 680 elective study hours could be used to teach medicine, surgery and/or obstretrics. There is no provision to prevent the 5000 chiropractors, now licensed (without training in such subjects) from practicing in these fields."

It is not contended by the Appellant that the above argument should be a factor to be considered by the court to permit the practice of medicine. It should however, be equally as persuasive that chiropractic is not restricted

to the mere adjustment of the spine by hand or that attempts to amend the Chiropractic Act is a factor in appellee's favor.

The Use of Ultrasonic Therapy Is an Advanced Physical Therapy Method and Does Not Constitute the Practice of Medicine.

It is true, as Appellee asserts, that medical doctors employ ultrasonic therapy. The device is used by medical doctors in a much different manner. The physician normally uses an output of energy from 3 to 6 watts per square centimeter of the transducer head. The device used by chiropractors is calibrated to put out one-half of a watt per square centimeter of the transducer head. The device used by physicians is used in the treatment of ailments much different than giving physiotherapy treatment. The fact however, that the device is used by physicians or by designating the device as one used in "physical medicine," as appellee asserts, does not exclude the Chiropractors from using such device. Such action on the part of physicians does not make the use of such devices the practice of medicine and detract from the authority of the chiropractic license accordingly. Appellee asserts that since the device produces high frequency sound waves which do penetrate the body that it must be the practice of medicine and not chiropractic. Appellee contends in support of this contention that the physician's and surgeon's certificate authorizes the holder among other things, "to sever or penetrate the tissues of human beings." It should be noted that the ultrasonic device does not sever the tissues of human beings and that the wording of the authorization quoted above for physicians and surgeons states ". . . to sever or penetrate." "Sever or pene-

trate" are used in the alternative and means the same thing. The action of the ultrasonic device and the treatment given thereby have no relation to the penetration described in the authorization given to physicians and surgeons. The devices under labeling approved by the Food and Drug Administration in this case are not the devices used by physicians in the practice of physical medicine. Even the devices used by physicians cannot be classed as devices for "penetration" as described in the authority of the physician and which is synonomous with the term "severing" as used therein.

The Decision of the District Court Is in Conflict With That Part of Section 7, the Chiropractic Act, Which Authorized Chiropractors "to Use All Necessary Mechanical and Hygienic and Sanitary Measures Incident to the Care of the Body."

There is no conflict in this case that the above quoted portion of Section 7 of the Chiropractic Act is not a definition of, but an addition to, chiropractic as used in the previous part of Section 7 and authorizes chiropractors to use measures which would not otherwise be within the scope of their licenses. Appellee contends that this authority is restricted to the use of mechanical tables or such devices that directly assist in the giving of spinal adjustment. Under the wording of the Chiropractic Act this view is so grossly restrictive as to be unreasonable. There is no question but what the drugless practitioners of 1922 could and did practice physiotherapy. The Chiropractic Act as stated on the California ballot in 1922 amended certain provisions of the Medical Practice Act. Conflicting portions of the Medical Practice Act under which chiropractors were licensed were set forth under the

ballot heading of "existing provisions" and a subheading of "provisions differing from proposed chiropractic act." This is set forth in Appellant's Exhibit B in the affidavit of Dr. Lee H. Norcross, D.C. The actual changes were in the division of the educational hours and the addition of 400 hours education together with the addition of the subject of "Chiropractic Theory and Practice." In the argument against the adoption of the act it was stated that the only purpose was to triplicate the work being done effectively and economically by one responsible Board of Examiners. Further, that many chiropractors had taken and passed the examination and were legally licensed under the Drugless Practitioners Act and legally practicing. The addition at that time of a new course called "Chiropractic Theory and Practice" is now being used by Appellee in support of its position that Section 7 limits the scope of chiropractic to include only that which was taught in schools and colleges under this particular one subject. As previously set forth the Drugless Practitioners Act and other Acts of California under which the chiropractor was licensed prior to the passage of the Chiropractic Act were necessary guides to fashion the new act and to include in the new act the methods and practices being taught and actually used prior to that time. It is submitted that Appellee's assertion is erroneous to the effect that the Chiropractic Act of 1922 was a new and independent movement which had as the basis of its scope the dictionary definitions of chiropractic which Appellee contends governs the wording of the Chiropractic Act.

Conclusion.

Section 7 of the Chiropractic Act adequately provides that Chiropractors shall not practice medicine, surgery, osteopathy, dentistry or optometry, nor use any drug or medicine now or hereafter included *in materia medica.* The Chiropractic Act considered as a whole contemplates the practice of a profession up to the point of these prohibitions. The Chiropractic Act provides for a scope of practice which includes drugless adjunct therapy of which physiotherapy and physiotherapy devices is included. It is respectfully submitted that Appellant's Motion to Compel Administrative Approval of Appellant's Proposed Method of Distributing Devices under Seizure be granted.

Respectfully submitted,

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